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IN THE

# Supreme Court of the United States

October Term, 1963

No. 821

Criminal

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MARVIN L. KLINE,

*Petitioner,*

vs.

STATE OF MINNESOTA,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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Petitioner prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Minnesota, entered in the above entitled case on August 30, 1963, affirming the judgment of conviction entered on April 5, 1961. A petition for rehearing was timely filed and denied on November 22, 1963.

Petitioner has been admitted to bail by the Court below.

## OPINIONS BELOW

The opinion below is reported in 124 N.W. 2d 416 — it has not as yet been reported in the Official Minnesota Reports.

## JURISDICTION

The jurisdiction of this court is invoked in 28 U.S.C.A. Sec. 1257(3).

The Minnesota Statutes provide that the district courts of the state shall have jurisdiction of all criminal offenses and that the Supreme Court of Minnesota is the highest appellate court of the state and has jurisdiction of all appeals from the district court under M.S.A. Sections 65.01 - 65.23.

Minn. Const. Art. 6, Sec. 1 and Sec. 2.

Lauritsen v. Seward, 99 Minn. 313, 109 N.W. 404.

The Supreme Court of Minnesota is the Minnesota Court of last resort in criminal cases.

Lading v. Duluth, 153 Minn. 464, 190 N.W. 981.

Krolling v. St. Paul Street Ry. Co., 96 Minn. 128, 104 N.W. 888.

## QUESTIONS PRESENTED

The questions presented by this petition for certiorari are:

(1) whether the submission to the jury of an issue as to which there is no evidence to support an affirmative finding together with other issues, where a general verdict is taken so that it cannot be determined upon what issue or issues the defendant was convicted, denies to the defendant due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; and

(2) whether the failure of the State Court to apply well settled rules of criminal law and procedure under which a submission such as that mentioned in (1) hereof, together with the failure to grant a mistrial upon the grounds of the prejudicial misconduct of the prosecuting attorney, denies of the Fourteenth Amendment to the Constitution of the Process Clause of the Fourteenth Amendment to the Constitution of the United States.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution; — U.S.C.A. Const. Amend. 14, Sec. 1, as follows:

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

## STATEMENT OF THE CASE

### I

### Procedural History of the Case

Petitioner was charged by an indictment with the crime of grand larceny under M.S.A. Sec. 622.01 and Sec. 622.05, which statutes read as follows:

Sec. 622.01:

"Every person who, with intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person:

(1) Shall take from the possession of the true owner, or of any other person, or obtain from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing, or secrete, withhold, or appropriate to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt, or contract, or article of value of any kind;

* * *

Steals such property, and shall be guilty of larceny."

Sec. 622.05(3):

"Every person who shall steal, or unlawfully obtain or appropriate in any manner specified in this chapter:

* * *

(3) Property of the value of more than $500 in any manner whatsoever—

Shall be guilty of grand larceny in the first degree, and punished by imprisonment in the state prison for not less than one year, nor more than ten years."

(Printed at pp. 1-5 of the record.)

## The Indictment

The indictment, upon which petitioner was tried, charged that petitioner obtained, in violation of said sections 622.01 and 622.05(3), the sum of $5,232.57 from the Sister Kenny Foundation, Inc., by means of letter authorizing payment of said sum to petitioner by the Foundation and bearing the signature R. D. Onan, Treasurer of the Foundation, which letter was received as an exhibit at the trial and marked State's Exhibit H; that the signature on the letter was either a "forgery" or that it was obtained of Onan by petitioner by means of "trickery and deceit" practiced by petitioner on Onan; that the payment to Petitioner of said sum of money as aforesaid was unauthorized, as petitioner well knew. (Exhibit H is printed on p. 3 of the record.).

Petitioner entered a plea of not guilty to the indictment.

## II

## The Facts Material to the Questions Presented. The Evidence at The Trial

The letter in question, State's Exhibit H, authorized an increase of petitioner's annual salary as Executive Director of the Foundation from $25,000 to $48,000. The $5232.57 in question was paid to petitioner by the Foundation as part of the increase in salary authorized by the letter. Evidence relative

to the question of the alleged forgery was extensive and established as a matter of law that the signature thereon of Onan was his genuine signature and not a forgery as claimed by the State. At the argument in the Supreme Court of Minnesota, the Assistant Attorney General of the State admitted the fact to be as stated and the Supreme Court of Minnesota so stated in its opinion. (124 N.W. 2d p. 422, par. (3) 2.)

The Supreme Court of Minnesota held that the remaining questions then were (1) whether Onan as Treasurer, had the power or authority to authorize the increase in salary mentioned, and (2) whether the letter, State's Exhibit H, was obtained from Onan by means of trickery and deceit as alleged; and, further that the evidence relative to both of these issues was in dispute and presented questions of fact for the determination of the jury, and that both questions, therefore, were properly submitted to the jury for its decision.

Petitioner's contention in the courts below was that there was absolutely no evidence to support a finding that the letter had been obtained from Onan by trickery and deceit. (124 N.W. 2d 421.) The only evidence relative to the alleged trickery and deceit consists of parts of the testimony of Onan, the petitioner, and petitioner's office assistant, Katherine Wilcox, which is short and which we quote:

Onan's Testimony (R. 376, f. 1-2):

> Q. Whenever you signed any letter or document, regardless of its nature, there was no one standing over you hurrying you so that you couldn't concentrate on what you were realiing and signing?
>
> A. No, sir.
>
> Q. You were never tricked into signing anything that you now recall signing?
>
> A. I'm sure I wasn't.

Q. Do you recall any attempt to trick you into signing anything?

A. No, sir.

Q. Has anything ever been submitted to you for your signature which upon examination you rejected?

A. No, sir.

Q. Has any attempt ever been made to your knowledge to trick you into signing anything that you did not understand or were not aware of?

A. "No, sir. I was never tricked."

Petitioner's Testimony (R. 1458, f. 2 - R. 1459, f. 3):

Q. Was she instructed by one or the other of you to draft an appropriate letter then on the basis of your suggestions?

A. Yes.

Q. Did you read the letter which she drafted before it was signed by Mr. R. D. Oman?

A. No, sir.

Q. I will show you State's Exhibit H and I will ask you to examine that briefly here.

A. I am familiar with it.

Q. And this is the letter, is it not, which Mrs. Wilcox drafted herself pursuant to Mr. Wagner's and your suggestions and instructions?

A. That's right.

Q. I will ask you if you forged the signature which appears on this letter?

A. No, sir.

Q. I will ask you if you had anyone do it for you at your request?

A. No, sir.

Q. I will ask you if you presented it to Mr. R. D. Oman personally for his signature?

A. No, sir.

Q. I will ask you if you had someone do it for you?

A. Well, it—no, sir, it went the normal course.

Q. I will ask you if you exercised any deceit, fraud or trickery in procuring Mr. R. D. Onan's signature on this letter?

A. Of course not.

Q. Mr. Kline, when is the first time that you saw the finished product, which is now identified here as Exhibit H?

A. On Mrs. Wilcox' desk with the mail.

Q. When?

A. Well, my guess—

Q. Just a moment, please, Mr. Kline. In a court of law no one is permitted to guess. You may estimate. A guess is sort of a wild estimate. We want an estimate, an accurate estimate.

A. It was several days prior to my receiving a check from the auditing office."

Mrs. Wilcox' Testimony:

Mrs. Wilcox testified that State's Exhibit H was typed by her in the offices of the Foundation (R. 446, f. 3); that it had been a practice to send papers from the Foundation's office to Onan for signature either by mail or messenger, which practice was pursued as to State's Exhibit H (R. 447, f. 3 - R. 448, fs. 1-2); that petitioner and one Wagner, who was the Foundation's legal counsel, requested Mrs. Wilcox to write and transmit State's Exhibit H to Onan, but did not dictate the letter, so that the actual composition was largely that of Mrs. Wilcox (R. 252, f. 3 - R. 453, f. 3; R. 455, f. 3 - R. 456, f. 1); that after the letter had been received by Onan it was mailed back to the Foundation, addressed to Mr. Dean who was the Financial Director of the Foundation (R. 458, f. 1 - R. 459, f. 1); that Mr. Onan did not sign State's Exhibit H in Mrs. Wilcox' presence (R. 470, f. 2 - R. 473, f. 2); that generally she sent a memo to Mr. Onan along with any papers trans-

mitted to him for his signature (R. 488, f. 1 - R. 489, f. 3); and so far as the extra question here is concerned, her testimony is: (R. 488, f. 3 - R. 489, f. 1):

> Q. Mrs. Wilcox, did you ever conceal any letter that you wanted him to sign without him knowing what he was signing, amongst any other papers?
>
> A. No.
>
> Q. Did you ever obtain his signature by deceit or by trickery on any letter or paper?
>
> A. No.
>
> Q. Did you ever send over any blank piece of stationery and request for him to affix his signature to that and return it to you before any typing had been put on it?
>
> A. No.

## Requested Instructions

Pursuant to the regular practice in Minnesota, the petitioner requested in writing before the closing arguments began, the following instruction: (R. 1679, f. 1-2):

## DEFENDANT'S REQUESTED INSTRUCTIONS

> You the jury are instructed that there is no evidence of forgery, fraud, deceit, trickery or any other illegal or improper method used by the defendant or anyone in his behalf, to obtain the signature of Robert D. Onan, upon State's Exhibit "H". Under those circumstances, the State has failed to prove its case against the defendant. I direct you to find him not guilty and sign a verdict in accordance with this instruction of the Court.

A verbal request for the same instruction was made at the close of all the evidence. (R. 1619, f. 3 - R. 1620, f. 1)

## The Instructions Given

The Trial Judge held that upon the evidence a fact issue was presented as to whether or not Onan had authority to adjust the salaries of the personnel of the Foundation and to execute State's Exhibit "H". That issue was submitted to the jury. At the same time, in spite of the fact that there was no evidence that Onan's signature upon State's Exhibit "H" was obtained by trickery or deceit, the Trial Judge submitted this issue to the jury. The pertinent parts of the charge with respect to this matter are as follows:

(R. 1646, f. 1-3):

> "It is the further and second claim of the State that if the jury finds that the treasurer, Onan, had been given authority by the Executive Committee or the Board of Directors otherwise to adjust Kline's salary as Executive Director, or that the defendant Kline believed that Onan had been given authority by the Executive Committee or otherwise to adjust his salary, then that the said Exhibit H had not been knowingly signed by the said Onan but that his signature, if it was his signature, had been obtained by fraud or deceit without his knowledge, that the defendant Kline knew that the same had been obtained by fraud and deceit and without Onan's knowledge as to its contents, and having this knowledge fraudulently, unlawfully and wrongfully presented this writing to Dean, acting as agent for the Foundation, that this was Onan's signature and that he, the said Onan, had authorized a raise in salary to $18,000.00 for the same with the intent that the said Dean should be deceived thereby and the said Dean did pay over to Kline the sum of $5,232.57, it being the intention of the defendant Kline to deprive the Foundation of this money."

(R. 1651, f. 2 - R. 1652, f. 2):

"If the jury should find either that Robert Onan had authority to adjust Kline's salary as Executive Director or that defendant Kline believed he had such authority (either of which are valid defenses which if believed would defeat the State's first claim) it is the contention of the State that there is evidence that Onan's signature on the writing known as Exhibit H was secured fraudulently and deceitfully without the knowledge on the part of the said Onan of the existence of the letter or of its contents and that it was presented wrongfully and unlawfully by the defendant Kline to and said Dean, an agent of the Foundation, with intention to deceive Dean and on his, the defendant's, representation that this signature on Exhibit H was secured with the full knowledge of Onan authorizing Dean on behalf of the Foundation to increase defendant's salary to $48,000.00, and in reliance thereon Dean drew a check in favor of the defendant and defendant accepted the same with the intention of depriving the said Kenny Foundation of its money and property.

In determining this claim by the state you have a right to take into consideration all of the facts and circumstances in this case. The State admits they have no direct evidence showing by what method Onan's signature was secured but contends that the State has established beyond a reasonable doubt that such signature was secured by deceit or trickery. They claim they have established this by what is known as circumstantial evidence."

## Motion For New Trial

In the Motion for a new trial, the instruction in question was assigned as error in the following language (R. 1682):

"(G) The Court erred in denying defendant's Requested Instruction, as follows:

You the jury are instructed that there is no evidence of forgery, fraud, deceit, trickery or any other illegal or improper method used by the defendant or anyone in his behalf, to obtain the signature of Robert D. Onan, upon State's Exhibit "H" Under those circumstances, the State has failed to prove its case against the defendant. I direct you to find him "not guilty" and sign a verdict in accordance with this instruction of the Court."

As stated above, the defendant had, prior to the delivery of the charge, requested an instruction to the effect that there was no evidence that State's Exhibit H had been obtained by trickery and deceit.

## III

## Federal Questions Raised Below:

The federal questions raised below are those stated above, viz:

(1) Whether the submission to the jury of an issue as to which there is no evidence to support an affirmative finding together with other issues, where a general verdict is taken so that it cannot be determined upon what issue or issues the defendant was convicted, denies to the defendant due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; and

(2) Whether the failure of the State Court to apply well settled rules of criminal law and procedure under which a submission such as that mentioned in (1) hereof, together with the failure to grant a mistrial upon the grounds of the prejudicial misconduct of the prosecuting attorney, denies to the defendant due process of law in

violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

In the trial court, petitioner raised the question by moving the Court, as we have pointed out above, that there was no evidence of fraud, deceit, trickery or any other illegal or improper method to obtain Onan's signature on State's Exhibit "H"; and by assigning in the motion for a new trial as a grounds therefor, the failure to give such instruction.

In the Supreme Court of the State, as shown on Pages 62-63 of the Petitioner's Brief as Appellant in the Court below, the question of the denial below of the due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States was raised by the following assignments of error:

"8. That the submission of the issues as to whether or not State's Exhibit "H" was a forgery, whether or not State's Exhibit "H" was obtained by the defendant through fraud and trickery and whether Mr. Onan had authority to authorize the change in defendant's salary from $25,000.00 to $48,000.00 constituted a denial to the defendant of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and of the provisions of the State Constitution, for the reason that, as a matter of law, there is no evidence to sustain an affirmative finding upon any of the issues so submitted.

"9. That the judgment of conviction denies to the defendant due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and the due process of law of the State Constitution for the reason that, if the defendant was entitled to a finding in his favor upon any of such issues, the verdict and the judgment entered thereon constitutes a violation of due process of law as aforesaid.

"10. That the court erred in submitting to the jury the issue as to whether or not State's Exhibit "H" was obtained by Mr. Onan of fraud and trickery."

These assignments of error were argued in Sections II, IV, and V.

Section II of the brief is entitled as follows:

*The Evidence Fails to Show that Mr. Onan's Signature on State's Exhibit H Was Obtained by Fraud or Trickery.*

Section IV. of the brief is entitled as follows:

*It Was Error for Lack of Evidence to Sustain an Affirmative Finding With Respect to Any of Such Issues to Submit to the Jury the Issues of Forgery, of State's Exhibit H, Obtaining the Same by Fraud and Trickery and Lack of Power in Onan to Make the Salary Adjustment in Question.*

Section V. of the brief is entitled as follows:

*The Submission to the Jury of the Issues Referred to in Subdivision IV Hereof Constitutes a Denial to Defendant of Due Process of Law in Violation of the Fourteenth Amendment of the Constitution of the United States.*

In the argument in Section V, Petitioner cited and relied upon:

Stromberg v. California, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117, 73 A.L.R. 1484.

Cramer v. United States, 325 U.S. 1, 65 S. Ct. Reporter 918,

and also a civil case decided by the Minnesota Court,

Ohrmann v. Chicago & N.W. Ry., 223 Minn. 580, 27 N.W. 2d 896.

The Court below held that the question as to whether State's Exhibit "H" had been obtained by Petitioner by means of fraud, deceit or trickery, had been submitted to the jury and said with respect to that matter (124 N.W. 2d 422):

> "* * * The question affirmatively submitted concerning this phase of the indictment was whether Onan knowingly signed the letter as claimed by defendant, or whether his signature was obtained through fraud, deceit or trickery as claimed by the State. * * *".

The Supreme Court of Minnesota held that the evidence sustained the finding implicit in the verdict that Exhibit "H" had been obtained by petitioner by means of fraud, deceit or trickery and said (124 N.W. 2d p. 421):

> *"The verdict necessarily implies a finding either that Onan had no authority to order a salary increase and that defendant knowing this obtained payments at the increased rate by falsely representing otherwise; or that if Onan's authority in fact existed, or defendant believed it did, he secured Onan's signature by fraud and deceit.* There is express statutory authority to allege the means of committing the offense in the alternative, and we conclude there is ample evidence to support the jury's conclusion that the offense was committed by using either or both methods of fraudulent representation."

The Court so held notwithstanding the undisputed and uncontradicted evidence that there was no proof at all that Exhibit "H" had been obtained through fraud, deceit or trickery.

In the Petition for Re-argument, petitioner called the court's attention at length to the fact that there was no evidence to sustain a finding that Onan's signature had been obtained by fraud, trickery or deceit. Petitioner repeated

therein the arguments made in his main brief and further called the court's attention at Page 4 of the Petition, to the case of Thompson v. Louisville, 362 U.S. 199, 4 L. Ed. 2d 654, 85 S. Ct. 624, 80 A.L.R. 2d 1355 (at Page 1361), holding that a conviction unsupported by evidence constitutes a denial of due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Thus it affirmatively appears that the petitioner raised the federal questions in the Supreme Court of Minnesota and that the Supreme Court of Minnesota decided the questions which had been so raised.

The decision below by the Supreme Court of Minnesota has decided the federal questions which petitioner raises in a way which is not in accord with applicable decisions of this Court

This Court will grant certiorari to review a federal question which has been raised in the highest court of the state and there considered and passed on.

Whitfield v. State of Ohio, 297 U.S. 431, 56 S. Ct. 532, 80 L. Ed. 778.

Home Insurance Co. v. Dick, 281 U.S. 397, 50 S. Ct. 338, 74 L. Ed. 926.

The question then is whether the Supreme Court of Minnesota decided the federal question raised in that court to the effect that the submission to the jury of the question as to whether or not petitioner obtained from Ouzts his signature on State's Exhibit "H" by means of trickery or deceit and permitting the jury to find the petitioner guilty upon the ground that the signature was so obtained. The rule which is applicable here is settled by several decisions of this court to the effect that where the state court might have

decided the question either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, this court will not review the decision. By the same token, if the state ground was not a substantial or sufficient one, it will be presumed that the state court based its judgment by decision of the federal question, in which case this court will take jurisdiction and review the question.

Williams v. Kaiser, 323 U.S. 471, 65 S. Ct. 363, 89 L. Ed. 398,

Staub v. City of Baxley, 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302,

N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488.

In Williams v. Kaiser, supra, the petitioner there alleged in a habeas corpus proceeding, that the Supreme Court of Missouri denied him due process of law in violation of the Due Process Clause of the Fourteenth Amendment, by holding that the failure of the trial court to appoint counsel for petitioner to defend him on a charge of robbery did not constitute a denial of Due Process. This Court held at 323 U.S. 477-478:

> "It is suggested, moreover, that for all we know the denial of the petition by the Supreme Court of Missouri rested on adequate state grounds. It is a well established principle of this court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v. Hanan, 300 U.S. 14, 18; Lynch v. New York, 293 U.S. 52. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the

judgment, the court will not undertake to review it. Klinger v. Missouri, 13 Wall. 257, 263; Wood Mowing & Reaping Machine Co. v. Skinner, 139 U.S. 293, 297; Allen v. Arguimbau, 198 U.S. 149, 154-155; Lynch v. New York, supra. We adhere to those decisions. But it is likewise well settled that if the independent ground was not a substantial or sufficient one, it will be presumed that the State Court based its judgment on the law raising the federal question, and this court will take jurisdiction'. Klinger v. Missouri, supra, p. 263; Johnson v. Risk, 137 U.S. 300, 307; Lawrence v. State Tax Commission, 286 U.S. 276, 282-283. Thus in Maguire v. Tyler, 8 Wall. 650 and in Neilson v. Lagow, 12 How. 98, 110, it was contended that the judgment rested on adequate state grounds. In neither was there an opinion of the state court. The Court examined the record, found the state grounds not substantial or sufficient, and reversed the judgments on the federal question. We think the principle of those cases is applicable here."

The Court further stated that:

"* * * No independent state ground to support the denial (of the petition for habeas corpus) appeared and that no other state ground therefor appeared. That is to say, the only state grounds which have been advanced in support of the decision below appear to be insubstantial. We can only assume therefore that the denial by the Supreme Court of Missouri was for the reason that the petition stated no cause of action based on the federal right."

The state judgment was reversed.

In Staub v. City of Baxley, supra, the petitioner was convicted of violating a city ordinance making it an offense to solicit citizens to become members of any organization, union

or society. The State Court of Appeals declined to pass on the defense that the ordinance was void as depriving the petitioner of freedom of speech in violation of the Constitution of the United States upon the grounds that petitioner lacked the right to raise the question and had not done so as required by local practice. At 355 U.S., Pages 318-319 this Court said:

> "At the threshold, appellee urges that this appeal be dismissed because, it argues, the decision of the Court of Appeals was based upon state procedural grounds and thus rests upon an *adequate non-federal* basis, and that we are therefore without jurisdiction to entertain it. Hence, the question is whether that basis was an adequate one in the circumstances of this case. 'Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution of a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this court must determine for itself the sufficiency of the allegations displaying the right of defense, and is not concluded by the view taken of them by the state court.' First National Bank v. Anderson, 269 U.S. 341, 346 and cases cited. See also Schuylkill Trust Co. v. Pennsylvania 296 U.S. 113, 122-123, and Lovell v. Griffin, 303 U.S. 444, 450. As Mr. Justice Holmes said in Davis v. Wechsler, 263 U.S. 22, 24, 'Whatever springes the state may set for those who are endeavoring to assert rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' Whether the constitutional rights asserted by appellant were '* * * given due recognition by the (Court of Appeals) is a question as to which the (appellant) is entitled to invoke our judgment, and this (she has) done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in sub

stance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support * * * (for) if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided." Ward v. Love County, 253 U.S. 17, 22, and cases cited.
Grounds mentioned were held to be non-substantial.

In N.A.A.C.P. v. Alabama, supra, this court said at 357 U.S. 455:

"Respondent recognizes that our jurisdiction is not defeated if the non-federal ground relied on by the state court is 'without any fair or substantial support,' Ward v. Board of County Commissioners, 253 U.S. 17, 22. It thus becomes our duty to ascertain, * * * in order that constitutional guaranties may appropriately be enforced, whether the non-federal ground independently and adequately supports the judgment." Citing Abie State Bank v. Bryan, 282 U.S. 765, 773.

The Supreme Court of Minnesota did not decide the case upon independent, adequate state grounds, but rather upon findings by the jury (124 N.W. 2d at p. 421):

"Either that Onan had no authority to order a salary increase and that defendant knowing this obtained payments at the increased rate by falsely representing otherwise; *or* that if Onan's authority in fact existed, or defendant believed it did, he secured Onan's signature by fraud or deceit."

The Court went on to state that, since the Minnesota statute authorizes that the means of committing an offense may be alleged in the alternative, such a submission, as the one quoted above, also may be made in the alternative, and thereupon the court stated:

"We conclude there is ample evidence to support the jury's conclusion that the offense was committed by using *either or* both methods of fraudulent representation."

This discussion relative to the alternative findings which the jury may have made, regardless of the fact that the one with respect to obtaining Onan's signature by fraud and deceit was not sustained by any evidence at all, is relevant only upon the assumption that the court considered and decided the federal question which we now urge.

Herb v. Pitcairn, 324 U.S. 117, 65 S. Ct. 459, 89 Law Ed. 789.

The Supreme Court of Minnesota did not dispose of the federal question here raised upon any state grounds, much less independent, adequate state grounds. On the contrary the court disposed of the question by stating that there was evidentiary support for a finding that petitioner had secured Onan's signature by fraud and deceit. This finding is absolutely without any evidentiary support of any kind and the decision of the Supreme Court of Minnesota that the finding has evidentiary support is plainly erroneous as being contrary to the fact. Under the rule of Thompson v. Louisville, 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624, 80 A.L.R. 2d 1355 (at page 1361), discussed infra, this court will set aside and disregard the baseless decision of the Supreme Court of Minnesota that there was such evidentiary support for the jury's finding.

While the Minnesota statute referred to in the decision of the Supreme Court of Minnesota authorizes the state to allege in an indictment or information alternative means by which the crime was committed, the statute does not au

thorize the submission to the jury either in the alternative or otherwise, an issue without evidentiary support as the basis for finding the defendant guilty. The statute should be construed in conformity of well settled rules of law that such a submission would deprive a defendant of due process of law in violation of the Due Process Clause of the Fourteenth Amendment. Any such submission constitutes a deprivation of due process of law in violation of the Due Process Clause of the Fourteenth Amendment and it is unthinkable that any statute of the state would provide for such an unconstitutional procedure.

It is noteworthy in this connection that as a matter of state law the submission of the issue to the jury as to whether petitioner obtained Onan's signature on State's Exhibit "H" by trickery or deceit itself constituted error of law and required a reversal.

State v. McLaughlin, 250 Minn. 309, 84 N.W. 2d 664.
State v. Gardner, 96 Minn. 318, 104 N.W. 971.

Since the state rule just mentioned is so interwoven with the federal rule, the decision of this court in Abie St. Bank v. Bryan, 282 U.S. 765, 51 S. Ct. 252, 75 L. Ed. 690 is pertinent here. There the court quoting from Enterprise Irrigation District v. Farmer's Mutual Canal Co., 243 U.S. 157, said:

> "But, where the non-federal ground is so interwoven with the other (the federal ground) as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain."

## ARGUMENT

### Certiorari Should Be Granted In the Instant Case For The Reason That The Judgment Below Was Rendered Against The Defendant By a Violation Of His Rights Under The Due Process Clause Of The Fourteenth Amendment.

As a separate and distinct proposition, the submission of the question as to whether or not Onan's signature on State's Exhibit "H" was obtained by trickery and deceit constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States for the reason that there was no evidence to support a finding that the signature had been so obtained. It appears as a matter of law that neither petitioner, nor Mrs. Wilcox, nor the Foundation's attorney, Mr. Wagner, ever so much as spoke a word concerning the matter of signing by Onan. The document had been prepared in the Foundation's Office by Mrs. Wilcox and transmitted to Onan by mail. Onan, did not communicate in any way with petitioner or Mrs. Wilcox or Wagner, nor did any of them communicate with him. Consequently they had done nothing to induce him or cause him to sign the document. Onan was alone when he signed the document. The affirmative evidence is that neither the petitioner nor Mrs. Wilcox nor Wagner did anything to cause or induce Onan to sign State's Exhibit "H". The facts detailed above preclude any thought that any of the persons named did anything to cause or induce Onan to sign the document.

In order to be criminal, or even wrongful, it was incumbent upon the state to prove that petitioner employed some trick

or device or scheme or stratagem to obtain from Onan the signature in question.

State v. Smith, 82 Minn. 342, 85 N.W. 12, 13.
89 C.J.S. P. 521.
64 C.J.S. P. 1309.

Since Onan signed the State's Exhibit "H", as he claims, without knowing how or why he did so, it cannot be said that he did so through any act of petitioner, much less any trick or deceit practiced by Kline upon him. It follows that petitioner was not guilty of practicing any trick or deceit upon Onan to obtain Exhibit "H".

This court on a Writ of Certiorari will always examine the record to determine whether there is "some" evidence, as distinguished from "sufficient" evidence to sustain a finding of guilt upon an issue submitted to the jury in the Supreme Court.

Thompson v. Louisville, 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624, 80 A.L.R. 2d 1355, (at page 1361), supra.

In the annotation in 80 A.L.R. 2d, the Thompson case is referred to as a "landmark case". (80 A.L.R. 2d 1364.) The annotation also states that the rule which we have just stated is supported by a general unanimity of judicial opinion, citing decisions of this court. (80 A.L.R. 2d 1368.) The state court necessarily decided the federal questions thus raised. There were no adequate or independent non-federal grounds upon which the court's decision could be predicated. In fact the court did not attempt to base its decision upon non-federal grounds.

Where, as here, several issues are submitted to the jury for its determination and a general verdict is taken and there is evidence to sustain an affirmative finding of guilt on some issues and no evidence to sustain a finding of guilt upon others, the submission violates the defendants rights in due process of law under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Williams v. No. Carolina, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 189,

Stromberg v. California, 282 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117, 73 A.L.R. 1484,

Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441

In the Williams Case, supra, which was a prosecution for bigamous cohabitation, the trial court submitted to the jury erroneously the question as to the invalidity of Nevada divorce decrees, which were claimed to be invalid for lack of jurisdiction over the defendants. Other issues were also submitted. This court held that the submission of the issue as to the validity of the Nevada divorce decrees was without legal foundation and said (317 U.S. 291-292):

> * * * In the second place, the verdict against petitioners was a general one. Hence even though the doctrine of Bell v. Bell, 181 U.S. 175, 45 L. ed. 804, 21 S. Ct. 551, supra, were to be deemed applicable here, we cannot determine on this record that petitioners were not convicted on the other theory on which the case was tried and submitted, viz., the invalidity of the Nevada decrees because of Nevada's lack of jurisdiction over the defendants in the divorce suits. That is to say, the verdict of the jury for all we know may have been rendered on that ground alone, since it did not specify the basis on which it rested. It therefore follows here

as in Stromberg v. California, 283 U.S. 359, 368, 75 L. ed. 1117, 1122, 51 S. Ct. 532, 73 A.L.R. 1484, that if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained. No reason has not been suggested why the rule of the Stromberg Case is inapplicable here. Nor has any reason been advanced why the rule of the Stromberg Case is not both appropriate and necessary for the protection of rights of the accused. To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights."

In the Stromberg Case, supra, Mr. Chief Justice Hughes, speaking for the Court said (283 U.S. 367-368):

"We are unable to agree with this disposition of the case. The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition, as it appears, upon an examination of the original record filed with this Court, that the State's Attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion

> from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld."

In the Cramer Case, supra, the defendant was charged with treason. There were some acts submitted to the jury which were sustained by evidence and others which were not sustained by evidence. A general verdict was taken. This Court reversed and said (325 U.S. at P. 39):

> "We cannot sustain a conviction for the acts submitted on the theory that, even if insufficient some submitted ones may be resorted to as proof of treason."

In Note 18 at P. 36 this court cited both the Stromberg and Williams cases, supra.

It is important in this case that the court grant certiorari, for the reason that the defendant has been sentenced to serve a term of not to exceed ten (10) years in the State Prison in Minnesota. The imprisonment and the stigma which is incident to it will be destructive of petitioner's future and all that he has to look forward to. All this has been caused by the failure of the State Court to accord to petitioner due process of law in accordance with the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. If the criminal charges against the petitioner were properly tried and he were given the benefit of due process of law, there can be no doubt that the result would be an acquittal rather than a conviction. The denial to petitioner of due process of law has resulted in an outrageous miscarriage of justice.

Petitioner has no remedy other than *certiorari* petitioned for by him. If *certiorari* is not granted, the petitioner is absolutely without any remedy to obtain relief from the errors committed below.

## CONCLUSION

Therefore, Petitioner respectfully requests that a Writ of Certiorari issue to the Supreme Court of Minnesota to review the judgment affirming the conviction of the petitioner which is set forth in the body of this petition: and upon such review that this Court grant to your petitioner a new trial upon the ground that the Judgment of Conviction denies to petitioner due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,
HARRY H. PETERSON,
729 Soo Line Building,
Minneapolis 2, Minnesota
Attorney for Petitioner

Of Counsel:
ALBERT E. JENNER, JR.
135 So. LaSalle Street
Chicago 3, Illinois

(Verification)

State of Minnesota
County of Hennepin—ss.

Harry H. Peterson being first duly sworn upon oath deposes and says: 1. That he is the Attorney for the petitioner named in the foregoing Petition. 2. That the same is true of his own knowledge.

Further Affiant sayeth not.

HARRY H. PETERSON

Subscribed and sworn to before me this 5th day of February, 1964.—Faith A. Saurer, Notary Public, Otter Tail County, Minn. My commission expires Nov. 24, 1967.

# APPENDIX

## SYLLABUS

1. Under an indictment for the crime of larceny by trick or false pretense which charges alternative theories of defendant's guilt, where the record contains evidence supporting either or both theories, the evidence sustains the verdict.

2. Where there is insufficient evidence to support the submission of one of the alleged means of committing the offense charged, the court's failure to specifically withdraw the issue in the charge did not result in prejudicial error where the charge submitted only the issues having evidentiary support and when read and viewed in its entirety is clear, complete, and impartial.

3. No prejudicial error or misconduct on the part of the prosecution resulted when in the opening statement it referred to a collateral transaction not embodied in the indictment, where the reference was made in good faith with the permission of the court; the admissibility of the supporting evidence was within the discretion of the court; and when subsequently ruled inadmissible, the jury was given a corrective instruction.

Affirmed.

## OPINION

ROGOSHESKE, Justice.

Defendant was indicted, tried, and convicted of larceny in the first degree for obtaining money from the Sister Elizabeth Kenny Foundation, Inc., his employer, in violation of Minn. St. 622.01 and 622.05, by falsely representing that as the executive director he was entitled to receive a salary increase from $25,000 to $18,000. His motion for judgment notwith-

standing the verdict or for a new trial was denied and he appeals.

The assignment of error supporting defendant's claim that he was denied a fair trial present the followinig questions for review:

(1) Whether the evidence is sufficient to support the conviction.

(2) Whether the trial court committed prejudicial error in the instructions to the jury.

(3) Whether the opening statement made by the prosecution referring to a claim of collateral misconduct, ruled inadmissible during trial, constituted prejudicial misconduct.

The indictment charged the crime of larceny by false pretenses. In substance it alleged that defendant, with criminal intent, obtained and received payment of an increase in his salary as executive director by presenting the following letter to Harvey M. Dean,[1] director of finance:

> "Dear Mr. Dean:
>
> "The salary structure for the position of Executive Director has been reviewed, and you are hereby authorized and directed to make the following adjustments in that classification:
>
> "Effective as of July 1, the annual salary of Marvin L. Kline, Executive Director, is to be increased by $14,000, payable from the Eastern Area Fund (of which $7,500 shall be charged to Eastern Area Operations and $3500 charged to Eastern Area Institute Operations) and an additional $12,000 from the International Training Center at the Elizabeth Kenny Institute in Minneapolis.
>
> "Yours very truly,
>
> R. D. OXAN
>
> Treasurer"

[1] Mr. Dean died approximately one week after the indictment was issued.

It was alleged that this letter was false and untrue and that defendants either knew that Robert D. Onan had not been authorized to increase his salary and falsely represented to Mr. Dean that Mr. Onan had such authority, or, if defendant knew or believed that Mr. Onan had authority, the letter "had not been signed by the said Robert D. Onan, or that his signature had been obtained by fraud or deceit." It was further alleged that in any event defendant presented the letter with intent to receive and defraud the foundation and that payment of the salary increase was made solely in reliance upon the letter.

In reviewing the sufficiency of the evidence we should emphasize that we do not try the facts anew. Our responsibility extends no further than to make a painstaking review of the record to determine whether the evidence, direct and circumstantial, viewed most favorably to support a finding of guilt, was sufficient to permit the jury to reach that conclusion.[2]

In the light of this settled rule we are satisfied that the jury could have found the following to be true. Defendant, age 57, a graduate architectural engineer and former alderman and mayor of Minneapolis, was one of the organizers of the foundation and had been its executive director practically since its inception. The Sister Elizabeth Kenny Foundation, Inc., is a nonprofit corporation which, before its incorporation as such in 1942, was called the Kenny Institute. It was organized and developed for the charitable purpose of making available to the general public a particular method of treatment for poliomyelitis. From defendant's observations as a publi-

[2] State v. Pankratz, 238 Minn. 517, 57 N.W. (2d) 635; State v. Lux, 235 Minn. 181, 50 N.W. (2d) 290; State v. Gayle, 234 Minn. 186, 48 N.W. (2d) 44; State v. Schabert, 222 Minn. 261, 24 N.W. (2d) 836; State v. Waddell, 187 Minn. 191, 245 N.W. 140.

official he became convinced that this method of treating polio, developed by Elizabeth Kenny, an Australian nurse, was reasonably effective. His prominence in community affairs, together with his conviction, ability, and experience enabled him, by dedicated efforts, to enlist many persons of ability, standing, and influence to bring the foundation into existence, first as a mere local institution and later in developing it into an organization of national and international renown.

The foundation was operated through an annual meeting of members who elected a board of directors, which in turn elected officers and an executive committee from its members as well as an executive director. Between meetings of the board and the executive committee, all members of which served without pay, the affairs of the foundation were conducted by defendant as executive director and his staff, the chief members of which were Mr. Dean, director of finance, and Fred Fadell, director of public information, all full-time salaried employees. By 1955 most of the original directors and officers had been replaced by personal friends and associates of defendant, who recruited them to become active in the work of the foundation. Defendant was held in high esteem and recognized by those closely associated with the work as the key leader of the foundation. Until the foundation became the subject of an investigation by the Minnesota attorney general in 1960, defendant enjoyed the unquestioning loyalty and confidence of his business and personal associates. This was particularly true of the members of the board of directors, including R. D. Oman, who was elected treasurer in 1957. Although the initiative, development, and supervision of the over all policy of the foundation were vested in the

board, the evidence convincingly establishes that they exercised very little initiative and supervision over the affairs of the foundation. As the trial court expressed it in a comprehensive memorandum accompanying its order, "The suggestions, the recommendations, the initiative and the action were supplied primarily by or through defendant. While it is not within the province of this Court to adjudge the care, or the lack of same, with which the Directors and Officers conducted themselves, it is at the least fair to say that they trusted defendant completely and to an extent not easily visualized by one who has not heard the evidence. This trust was founded in part upon defendant's prior public service, their close personal association with him, his many years with the Foundation and extensive knowledge and control of its affairs and perhaps a rather forceful personality. * * *."

When defendant officially became the foundation's executive director in 1946, the board set his salary at $12,500. In recognition of the value and effectiveness of his services, his salary was increased in 1950 to $17,500, in 1952 to $25,000, and there were conversations about a further increase among several board members who regarded his services as so extensive and productive as to be deserving of a more substantial salary. In June 1955, for the obvious purpose of favoring the defendant with job security, the by-laws were amended to provide: "He [the executive director] should be hired for a term of not less than three years at an annual stipend to be agreed upon between the Board of Directors and Executive Directors. The said contract of employment to be in writing and signed by the President and Secretary of the Foundation and the Executive Director." Promptly thereafter, in July 1955, such a contract for a 5-year term at an annual salary of $25,000, plus expenses necessary to the office in an unlimited amount, was executed.

The salary increase involved here was never incorporated into any written contract either by an amendment to the 5-year contract or otherwise. Nor does the evidence disclose any record of formal action by the board of directors or the executive committee specifically authorizing a revision of the salary provision of the written contract. On the same day the by-laws were amended requiring a written employment contract, the first of a series of $50,000 single-premium, annuity contracts was authorized to be purchased for defendant as deferred compensation, apparently because of a heart attack suffered by defendant in 1954. The resolution authorizing this action and a recommendation that 4 more like contracts be purchased, one each for 4 years, was passed at a meeting of the executive committee "sitting as a Board of Governors of the Minnesota Five State Area." This was the first time that minutes, separately maintained apart from the regular minute book, disclosed a meeting described as the "Board of Governors of the Minnesota Five State Area." Unlike the minutes of the board and of the executive committee, the pages were not consecutively numbered and copies were not distributed to the members of the board. Subsequent minutes of the meetings of the executive committee denoted as such board of governors discloses authority for the purchase of additional annuity contracts. One set of such minutes purport to be a record of a meeting held on July 17, 1957. It was at this meeting that defendant claims Olson also received authority to adjust his salary. Defendant received two of the $50,000 annuities outright and by their terms he was permitted to cash them at will subject to being then employed by the foundation. He did receive the value of one contract presented for payment on March 1960, but his attempt in September 1960 to cash the first contract purchased for him was refused because he was no longer employed by the foundation.

The above-quoted letter from Oman was presented by defendant to Dean in October 1957. It is undated and the customary initials of the secretary-typist do not appear, although Mrs. Katherine Wilcox, defendant's long-time private secretary, who served him when he was in the private practice of his profession, testified to a belief that she was the typist. Neither the old nor the new salary was set forth in the letter. A photostat was presented by defendant to Dean and by him to Mr. Charles T. Helgeson, the chief accountant, for processing. Upon receipt of the letter, Helgeson remarked: "That's a whopping big increase." Dean responded, "You've got Mr. Oman's signature, what more do you want?" Both of these men effected payment of the salary at the increased rate in sole reliance upon the letter. Defendant was paid at the increased rate from July 1, 1957, until March 28, 1960, when he resigned. Not a single officer or member of the board, including those members serving as the executive committee and Mr. Oman, were aware of the salary increase until March 1960, when it was disclosed as a result of an investigation by the attorney general. Nor did they know that the "annuity program" included five separate $50,000 annuity contracts. The only persons having knowledge of the salary increase were Dean, Helgeson, Mrs. Wilcox, Mr. J. George Zimmerman, an accountant, called as a defense witness, who audited the records of the foundation from 1951 through 1959, and the defendant. Other than the testimony concerning salary discussions prior to the time when the letter was presented, defendant at no time thereafter acknowledged or expressed appreciation for or made comment upon the salary raise to board members.

A large part of the testimony related to the main dispute in the evidence, namely, Oman's authority to increase defend

ant's salary, and if such authority existed, whether Onan knowingly exercised his authority by means of the letter. There was evidence which permitted the jury to find that the board delegated such authority to adjust the salary of some 400 foundation personnel, including defendant, to the executive committee and this committee in turn had subdelegated such authority to Onan; that this was a practice followed in the past, the board either adopting the recommendations of defendant and the treasurer directly or ratifying the actions taken by the executive committee as reported by defendant. There was also evidence contradicting Onan's testimony that he had no knowledge of the letter, its contents, or import; his disavowal of any authority to raise defendant's salary; and his insistence that he had no recollection of reading or signing the letter and would not have signed if he had known its import. The testimony of defendant, corroborated by the testimony of others concerning customary practices, directly conflicted with Onan's testimony. Thus, the jury was permitted, as urged by the defendant, to find that he had received the money "under a claim of title preferred in good faith, even though the claim be untenable." [3]

On the other hand there was persuasive evidence that the board, consistent with the by-laws, had not delegated authority to increase defendant's salary and that the minutes of the meeting of the "Board of Governors for the Minnesota Five State Area" on July 17, 1957, which contained a recital that such authority was subdelegated to Onan, as well as the meeting itself, were a complete fabrication, being part of a calculated scheme on the part of defendant, experienced and knowledgeable in corporate proceedings, to defraud the foundation; that any evidentiary presumption arising out of the existence

[3] Minn. St. 622.18

of minutes that a meeting actually occurred on July 17, 1957, and that it was properly constituted [1] was clearly overcome by the conflicting testimony of those members therein recorded as present and participating. Further, the evidence showed that if loose business practices permitted defendant to assume Onan's authority, or subsequent ratification, he nevertheless took deliberate advantage of the inattention he encouraged Onan to pay to his responsibilities and betrayed the confidence and trust reposed in him by Onan and the members of the board by deceiving Onan into signing a letter knowing that he would not read it or be aware of its contents and effect.

These fact issues were submitted to the jury under clear and impartial instructions. The jury rejected defendant's claims as untrue and accepted as true the testimony and inferences supporting the prosecution. As observed by the trial court, "No cogent reason has been advanced for his friends to falsify their lack of knowledge of the raise. In fact, on cross-examination, almost without exception, the various Board members were anxious to vouchsafe their admiration for defendant."

The verdict necessarily implies a finding either that Onan had no authority to order a salary increase and that defendant knowing this obtained payments at the increased rate by falsely representing otherwise; or that if Onan's authority in fact existed, or defendant believed it did, he secured Onan's signature by fraud or deceit. There is express statutory authority to allege the means of committing the offense in the alternative,[2] and we conclude there is ample evidence to support the jury's conclusion that the offense was committed by using either or both methods of fraudulent representation.

[1] Heintzelman v. Druids' Relief Assn. 38 Minn. 138, 36 N.W. 100.
[2] Minn. St. 628.14.

2. As indicated, one of the alternatives alleged in the indictment included a claim that Onan's signature was a forgery. At trial the state did not specifically concede that evidence was insufficient to justify submitting this issue. However, the court before the arguments and the charge indicated agreement with defendant's position that the evidence required a finding that Onan in fact signed the letter. On appeal the state with commendable candor concedes that the defendant's position is correct and that it would have been error to submit the issue. The state contends that it is not submitted, while defendant argues that a part of the charge referred to this claim and could have been understood by the jury as one of the fact issues submitted since the court did not specifically withdraw the issue as defendant requested. A review of the record clearly discloses that no real controversy existed about this matter. It is equally clear that defendant made no specific request to withdraw this as a single issue, but rather requested a general instruction that there was "no evidence of forgery, fraud, deceit, trickery or any other illegal or improper method used by defendant" to obtain Onan's signature.

An overall view of the record on this point leaves us with the distinct impression that the parties and the court understood this issue to be out of the case and that it was not intended to be submitted. It is true that the indictment which alleges forgery was read and was followed by a summary of the claims of the parties, including the claim of forgery. Nevertheless, it cannot be persuasively argued that the charge when read and viewed in its entirety[6] submitted the issue. The question affirmatively submitted concerning this phase of

[6] State v. Axilrod, 248 Minn. 204, 79 N.W. (2d) 677; State v. Billington, 241 Minn. 418, 63 N.W. (2d) 387.

the indictment was whether Onan knowingly signed the letter as claimed by defendant, or whether his signature was obtained through fraud, deceit, or trickery as claimed by the state. Thereby the issue of forgery was effectively withdrawn by nonsubmission. At the close of the charge, no exceptions were taken which indicated that defendant desired the court to specifically withdraw the issue. In view of the complications of the case we are impressed with the clarity of the instructions. We are obliged to hold that the record and the charge provides no reasonable basis for the claim that the jury was misled or could have reached a verdict of guilt upon a finding of forgery, which we, of course, would regard as constitutionally impermissible because of the lack of evidentiary support.

All other assignments challenging the instructions have been examined. None of them disturb our conviction that the charge understandably informed the jury of the issues of fact and the applicable law and was commendably impartial and complete.

3. Our greatest concern has been over defendant's claim that the prosecution committed prejudicial misconduct in its opening statement. Before any testimony was taken, the prosecution, announcing a desire to define the issues in order to guard against possible prejudice in the admission of evidence or in the opening statement, submitted a written offer of proof. The offer was in the nature of a pretrial disclosure outlining the state's evidence. It revealed an intention to also offer testimony that defendant secretly received money from the foundation, apart from the salary increase, by incurring unauthorized expenses of a personal nature, by causing the foundation to purchase a quarter of a million dollar annuity program for his benefit without the full knowledge or ap

proval of the board, and by entering into contracts with mailing companies in Chicago in connection with fund-raising campaigns whereby substantial fees and other benefits were paid to others—principally Fadell—without the complete knowledge or the authority of the board, and that defendant, by secret arrangement with Fadell, received "kickbacks" paid through him of approximately $20,000 a year between 1952 and 1957; that these payments from Fadell terminated just prior to the unauthorized salary increase and coincided with defendant's need for money by reason of a tax liability. The state contended that the evidence was relevant to motive or intent, tending to show that defendant was engaged in a common plan or scheme to defraud the foundation by taking advantage of his position of trust. Defendant objected to the offer as incompetent, irrelevant, and prejudicial and asked the court to confine the prosecution to trial of only those facts which were embodied in the indictment, requesting that the court instruct the prosecution not to refer to any such collateral transactions in the opening statement.

The court reserved ruling until such time as the evidence was offered and it was agreed that separate offers out of the jury's hearing would be made and full argument allowed. After an extended discussion, the court ruled provisionally that the prosecution could not refer to any collateral transaction in the opening statement except the one which related to the claim of "kickbacks" from Fadell and then only to the extent that the state expected to prove that defendant suffered a reduction in his income in the amount and at the time disclosed by the offer.

The opening statement was brief and conformed strictly to the court's restrictions, making no reference to any claim that defendant received these payments in secret, referring to the

arrangement simply as an agreement that Fadell had with defendant "to split his income from the Chicago mailing outfit." Thereupon defendant recorded the same objections voiced when the offer of proof was made, and after the first witness testified very briefly, added to the record by coupling his exceptions to the provisional ruling with a motion for a mistrial.

Well past the midpoint of the trial, when the evidence regarding "kickbacks" was submitted by renewing the offer of proof, the court, after extended argument, ruled the evidence inadmissible. Upon the state's request, and apparently after a discussion with counsel, the court instructed the jury that defendant's objection to questions concerning financial transactions between Fadell and defendant were sustained and that although the state in "good faith" had declared its intention to go into the matter, the court ruled it improper to do so. Defendant at that time made no claim that the correcting instructions were inadequate or renewed his motion for a mistrial.

Defendant does not challenge the court's determination that the opening statement was made in good faith upon the belief that the evidence was admissible, but argues that it nevertheless constituted misconduct and was so highly prejudicial that it could not be corrected by any action of the trial court short of granting his motion for a mistrial. The court found no misconduct or prejudice. We have reached the conclusion that the prosecution did not commit misconduct and that reversing the trial court's decision that defendant was accorded a fair trial free from prejudicial error would not be warranted upon the record.

The prosecution may outline the facts in the opening statement which he expects to prove to aid the jury in following

the testimony. This statement is not evidence but a recital of factual claims expressed with an intention and expectation that testimony will be offered and received to support them. If the facts are stated *in good faith* with reasonable grounds to believe that the evidence to be offered in proof of such facts is admissible, no error is committed.[7]

Here reference to the collateral transaction was unquestionably made in good faith with the express permission of the court. Exceptional care was used to ascertain the probable admissibility of the supporting evidence before the opening statement was made. Clearly the prosecution cannot be charged with misconduct in the sense of a calculated design to inject prejudice. The error, if any, was occasioned by the court's provisional ruling followed much later by the ruling that the evidence was inadmissible. While the jury may have inferred that it was misconduct for defendant and Fadell to "split" the latter's income from the Chicago company, we fail to see how this transaction could be interpreted by the jury as a separate crime or as unrelated to the crime charged. The jury heard no evidence or any further mention of the matter as the offer of proof was made during direct examination of Fadell and out of the hearing of the jury.

When defendant's objection was sustained, the error committed by the provisional ruling was revealed. If the opening statement prejudiced defendant's substantive rights, its impact occurred at this time. It seems reasonable to infer that defendant *not renewing* his motion for a mistrial or requesting additional corrective instructions, must have considered the reference to be less prejudicial than the words, skillfully and comprehensively employed to protect the record, would indicate.

[7] 23A C. J. S. Crim. Law § 1085, p. 596.

Moreover, the admissibility of the evidence was addressed to the discretion of the trial court. We are not prepared to say that the court would have committed error in admitting the evidence. In a case of this kind the evidence may properly cover all the facts and circumstances which tend to show the course of dealings between the parties concerned before and after the offense.[8] It is competent to show the defendant's financial situation[9] and generally any acts or transactions which bear on defendant's effort to wrongfully divert funds[10] or tend to show a common scheme or plan in perpetrating crimes involving fraud.[11] The trial judge was in the best position to balance the factors for and against admission of this evidence. We are inclined to believe that secretly obtaining money by way of "kickbacks" was as much a part of the defendant's plan to take advantage of his position of trust as was his conduct in funneling every decision through himself, fabricating minutes, obtaining annuity contracts, and his actions in securing an increase in salary. However, the complexities of the transaction may well have required a volume of testimony disproportionate to its probative value and therefore properly excludable in the discretion of the trial court.

Considering that the reference to this transaction was made in good faith with the permission of the court, that the supporting evidence was admissible or inadmissible upon the discretion of the trial court, and that a cautionary or corrective instruction was given following the ruling exclud

[8] State v. Force, 100 Minn. 396, 111 N.W. 297.

[9] State v. Rosenswieg, 168 Minn. 459, 210 N.W. 403; State v. Lytle, 214 Minn. 171, 7 N.W. (2d) 305.

[10] State v. Thompson, 241 Minn. 39, 62 N.W. (2d) 512.

[11] State v. Hacker, 153 Minn. 538, 191 N.W. 37; State v. Bock, 229 Minn. 449, 39 N.W. (2d) 887.

ing the evidence, we hold that the prosecution did not commit misconduct and that no reversible error resulted from permitting the transaction to be referred to in the opening statement.

Affirmed.

Mr. Justice Thomas Gallagher took no part in the consideration or decision of this case.

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November 22, 1963

STATE OF MINNESOTA,

Respondent,

vs.

38481

MARVIN L. KLINE,

Appellant.

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

MAE SHERMAN

Clerk Supreme Court.